STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 18, 2007
v	No. 273006 Kent Circuit Court
CURTIS LAVERNE BAKER, Defendant-Appellant.	LC No. 05-006525-FC

Before: Bandstra, P.J., and Meter and Beckering, JJ.

PER CURIAM.

Defendant was convicted of first-degree criminal sexual conduct (CSC-1), MCL 750.520b(1)(a),[1] following a jury trial. Defendant was sentenced as an habitual offender, third offense, MCL 769.11, to life imprisonment. We affirm.

I

Defendant first argues that he is entitled to a new trial because he did not receive complete discovery material. We disagree. This Court reviews a trial court's decision regarding discovery for an abuse of discretion. *People v Phillips*, 468 Mich 583, 587; 663 NW2d 463 (2003). "[A]n abuse of discretion standard acknowledges that there will be circumstances in which there will be no single correct outcome; rather, there will be more than one reasonable and principled outcome." *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

The accused in a criminal proceeding has the right to present a defense under our state and federal constitutions. US Const, Ams VI, XIV; Const 1963, art 1, §§ 13, 17, 20; *People v Anstey*, 476 Mich 436, 460; 719 NW2d 579 (2006). "[T]he right to present a defense is a fundamental element of due process . . . ." *People v Hayes*, 421 Mich 271, 279; 364 NW2d 635 (1984). This Court has ruled that there are

> three situations in which a defendant's due process rights to discovery may be implicated: (1) where a prosecutor allows false testimony to stand uncorrected;

[1] Defendant was also charged with breaking and entering, MCL 750.110. That charge was dismissed due to an expiration of the statute of limitations.

> (2) where the defendant served a timely request on the prosecution and material evidence favorable to the accused is suppressed; or (3) where the defendant made only a general request for exculpatory information or no request and exculpatory evidence is suppressed. [*People v Tracey*, 221 Mich App 321, 324; 561 NW2d 133 (1997).]

In other words, "[d]ue process requires the prosecution to disclose evidence in its possession that is exculpatory and material, regardless of whether the defendant requests the disclosure." *People v Schumacher*, 276 Mich App 165, 176; 740 NW2d 534 (2007). This proposition was first announced in *Brady v Maryland*, 373 US 83, 87; 83 S Ct 1194; 10 L Ed 2d 215 (1963). To establish a *Brady* violation, the defendant must demonstrate: "(1) that the state possessed evidence favorable to the defendant; (2) that the defendant did not possess the evidence nor could the defendant have obtained it with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different." *People v Cox*, 268 Mich App 440, 448; 709 NW2d 152 (2005).

MCR 6.201 provides in pertinent part:

> **(A) Mandatory Disclosure**. In addition to disclosures required by provisions of law other than MCL 767.94a, a party upon request must provide all other parties:
>
> (1) the names and addresses of all lay and expert witnesses whom the party may call at trial; in the alternative, a party may provide the name of the witness and make the witness available to the other party for interview; the witness list may be amended without leave of the court no later than 28 days before trial;
>
> (2) any written or recorded statement pertaining to the case by a lay witness whom the party may call at trial, except that a defendant is not obliged to provide the defendant's own statement;
>
> (3) the curriculum vitae of an expert the party may call at trial and either a report by the expert or a written description of the substance of the proposed testimony of the expert, the expert's opinion, and the underlying basis of that opinion;
>
> (4) any criminal record that the party may use at trial to impeach a witness;
>
> (5) a description or list of criminal convictions, known to the defense attorney or prosecuting attorney, of any witness whom the party may call at trial; and
>
> (6) a description of and an opportunity to inspect any tangible physical evidence that the party may introduce at trial, including any document, photograph, or other paper, with copies to be provided on request. A party may request a hearing regarding any question of costs of reproduction. On good cause

shown, the court may order that a party be given the opportunity to test without destruction any tangible physical evidence.

(B) Discovery of Information Known to the Prosecuting Attorney. Upon request, the prosecuting attorney must provide each defendant:

(1) any exculpatory information or evidence known to the prosecuting attorney;

(2) any police report and interrogation records concerning the case, except so much of a report as concerns a continuing investigation;

(3) any written or recorded statements by a defendant, codefendant, or accomplice pertaining to the case, even if that person is not a prospective witness at trial;

(4) any affidavit, warrant, and return pertaining to a search or seizure in connection with the case; and

(5) any plea agreement, grant of immunity, or other agreement for testimony in connection with the case.

In this case, defendant committed a sexual assault on the victim in 1992. The emergency room physician who examined the victim following the assault collected DNA samples with a CSC-kit. Given that there were no suspects, however, the police did not conduct an analysis of the DNA at that time. More than 11 years later, the federal government provided a grant to conduct DNA analysis on cold cases. Cellmark Orchid conducted a DNA analysis of the CSC-kit in this case. After the analysis, the Michigan state police linked defendant to this 1992 crime. Further, a subsequent DNA analysis using a recent buccal swab sample of defendant's DNA confirmed the results of Cellmark Orchid's analysis. A forensic scientist with the Michigan state police testified at trial regarding the accuracy of the DNA match:

> [T]he probability…if I went out into the general population and I just picked an individual at random and took their DNA and I analyzed it, and the probability of selecting an unrelated individual at random from the general population that would have the same profile as a profile that is on those evidentiary samples, in Caucasian, is one in 1.9 quintillion; African-American, it's one in 2.5 quadrillion; and Hispanic, it's one in 7.9 quintillion.

Defendant argues that the prosecution did not provide him with Cellmark Orchid's "testing procedures," including "electronic data." Thus, defendant asserts that "it was impossible to conduct any meaningful cross-examination relative to the testing of the sample sent to the laboratory." Defendant does not claim that the actual DNA profile report from Cellmark Orchid was not received. Moreover, defendant concedes that an expert was provided for the defense to review the DNA evidence, who confirmed that the results of the DNA analysis appeared to be accurate.

We reject defendant's claim of an alleged discovery violation. The testing procedures do not fall within any of the categories under MCR 6.201. The record does not reflect that defendant requested the testing procedures under MCR 6.201(B), and there is no showing that the procedures were "the underlying basis of [an expert's] opinion" under MCR 6.201(A)(3). In fact, the testing procedures were not admitted at trial. In this case, none of the situations that implicate a defendant's due process rights are present. See *Tracey, supra* at 324. Moreover, defendant failed to establish a *Brady* violation because there was no showing that the evidence was favorable to the defense. See *Cox, supra* at 448. Therefore, even if a discovery violation had occurred, defendant cannot establish that the violation constituted outcome-determinative error warranting reversal. *Id*. See *People v Elston*, 462 Mich 751, 765-766; 614 NW2d 595 (2000) (stating that nonconstitutional error is subject to harmless error analysis).

II

Next, defendant asserts that the trial court erred in admitting other acts evidence. We disagree. This Court reviews the admission of evidence for an abuse of discretion. *People v Johnson*, 474 Mich 96, 99; 712 NW2d 703 (2006).

MRE 404(b)(1) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

Our courts use three factors to determine the admissibility of "prior-bad-acts" evidence. These factors are (1) whether the bad-acts evidence is offered for a proper purpose; (2) whether the evidence is relevant; and (3) whether the probative value of the evidence is not substantially outweighed by its potential for unfair prejudice. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004).

"[T]he prosecution bears the initial burden of establishing the relevance of the evidence to prove a fact within one of the exceptions to the general exclusionary rule of MRE 404(b)." *Id*. "Relevance is a relationship between the evidence and a material fact at issue that must be demonstrated by reasonable inferences that make a material fact at issue more probable or less probable than it would be without the evidence." *People v Crawford*, 458 Mich 376, 387; 582 NW2d 785 (1998). "Where the only relevance of the proposed evidence is to show the defendant's character or the defendant's propensity to commit the crime, the evidence must be excluded." *Knox, supra* at 510. However, "evidence of similar misconduct is logically relevant to show that the charged act occurred where the uncharged misconduct and the charged offense are sufficiently similar to support an inference that they are manifestations of a common plan, scheme, or system." *People v Sabin (After Remand)*, 463 Mich 43, 63; 614 NW2d 888 (2000). "General similarity between the charged and uncharged acts does not, however, by itself, establish a plan, scheme, or system used to commit the acts." *Id.* at 64.

In *Knox, supra* at 504, 506-507, the prosecution introduced evidence of the defendant's angry disposition and prior examples of child abuse in a case involving felony murder with first-degree child abuse as the underlying felony. Our Supreme Court held that "[t]he trial court committed plain error when it admitted this evidence." *Id.* at 513. The Court found that "[t]he evidence of defendant's past demonstrations of anger were not relevant to any material fact at issue and did not meet the requirements set forth in *Sabin* for admissibility." *Id.* at 512. Significantly, the Court concluded that "none of defendant's alleged manifestations of anger had any similarity to the acts that resulted in [the victim's] death." *Id.* Thus, "the evidence of defendant's past anger could only serve the improper purpose of demonstrating that he had the bad character or propensity to harm [the victim]." *Id.* at 512-513.

In *People v Knapp*, 244 Mich App 361, 365-367; 624 NW2d 227 (2001), the defendant was convicted of second-degree criminal sexual conduct where the defendant engaged in a sexual act with a 14-year-old victim. At trial, the prosecution "moved to admit evidence that defendant engaged in the sexual penetration of a student in 1976, when defendant was a fifth-grade teacher in Illinois," arguing that such "evidence was probative of defendant's common scheme or plan in victimizing his students for his own sexual gratification." *Id.* at 379. This Court concluded that "the trial court did not abuse its discretion in admitting the similar acts evidence" because "[t]he similar acts evidence was relevant to show that defendant touched complainant for the purpose of his own sexual gratification." *Id.* at 379-380.

In the instant case, the trial court permitted the testimony of a female who had been the victim of a 1996 assault by defendant. Defendant and another individual entered the woman's home under false pretenses, robbed her, and defendant attempted to rape her.[2] In this case, defendant and another individual entered the young male victim's home, stole items from the victim's room, and defendant raped the victim. At the time of both offenses, defendant was abusing drugs and sought to obtain money or property by breaking and entering or unarmed robbery, whereafter defendant undertook to sexually assault the victim.

Certainly, some dissimilarities exist between the facts in the two cases. However, "distinctive and unusual features are not required to establish the existence of a common design or plan." *People v Hine*, 467 Mich 242, 252-253; 650 NW2d 659 (2002). Rather, "[t]he evidence of uncharged acts needs only to support the inference that the defendant employed the common plan in committing the charged offense." *Id.* at 253. This case is closer to *Knapp* than *Knox*. In *Knox, supra* at 512, our Supreme Court concluded that "defendant's past demonstrations of anger were not relevant to any material fact at issue." Whereas, in *Knapp, supra* at 380, "the evidence was highly probative of defendant's common scheme because each step of defendant's prior conduct in approaching and isolating his victim mirrored his conduct in this case." Unlike *Knox*, the challenged evidence in this case is not a predisposition, but demonstrates a common scheme or plan to escalate a robbery or larceny to a sexual assault. Further, the trial court provided "an appropriate limiting instruction to the jury, admonishing it to consider the evidence only for its proper purpose." *Knapp, supra* at 380. Because we defer to

[2] Following these offenses, defendant was convicted of unarmed robbery and assault with intent to commit criminal sexual conduct.

the trial court on close evidentiary questions, we conclude that the trial court did not abuse its discretion in admitting the challenged evidence. See *Sabin (After Remand)*, *supra* at 67-68 (holding that when "reasonable persons could disagree on whether the charged and uncharged acts contained sufficient common features to infer the existence of a common system," the trial court's decision cannot ordinarily constitute an abuse of discretion).

Even if the trial court had abused its discretion in admitting the other acts evidence, reversal is not warranted. The error was harmless in light of the compelling DNA evidence in the instant action. *People v Murray*, 234 Mich App 46, 64; 593 NW2d 690 (1999).

III

We also conclude that defendant's claim of a violation of the 180-day rule lacks merit. Whether a defendant has been denied his right to a speedy trial is a mixed question of fact and law. *People v Gilmore*, 222 Mich App 442, 459; 564 NW2d 158 (1997). A trial court's factual findings are reviewed for clear error, while constitutional questions of law are reviewed de novo. *Id.*

"The 180-day rule, codified in MCL 780.131, provides that a prison inmate who has a pending criminal charge must be tried within 180 days after the Department of Corrections delivers to the prosecutor notice of the inmate's imprisonment and requests disposition of the pending charge." *People v Williams*, 475 Mich 245, 247; 716 NW2d 208 (2006). MCR 6.004(D) was amended to conform with MCL 780.131. *Id.* at 258 n 5. The 180-day commences on "the day after the prosecutor receives notice that a defendant is incarcerated and awaiting trial on pending charges." *Id.* at 256-257 n 4.

Defendant's argument that he is entitled to dismissal based on a violation of the 180-day rule is without merit. Defendant provides an incorrect statement of the law as to when the 180-day period commenced, arguing that the period began in June 2005 when defendant was arraigned. As we noted, however, the only action that triggers the 180-day period is the delivery of the Department of Correction's notice to the prosecution. *Id*. The lower court record in this case does not contain the Department of Correction's notice; nor is there any mention of such a notice in the trial transcripts or defendant's appellate brief. Defendant bears the burden of furnishing the reviewing court with a record to verify the factual basis of any argument upon which reversal is predicated. *Elston*, *supra* at 762. Defendant failed to carry his burden.

IV

Finally, defendant argues that the trial court abused its discretion in admitting photographs that depicted the victim's injuries. This Court reviews a trial court's decision on the admissibility of photographs for an abuse of discretion. *People v Mills*, 450 Mich 61, 76; 537 NW2d 909 (1995).

We conclude that the trial court did not abuse its discretion in admitting the two photographs that depicted the victim's injuries. The elements of an offense were always at issue, *id*. at 71, so the prosecution properly sought to introduce all relevant evidence to establish beyond a reasonable doubt that the victim was anally penetrated. The record reflects that the photographs are not marginally probative, but key pieces of evidence in establishing an element

of the crime and corroborating the doctor's testimony regarding the extent of the victim's injuries. *Id.* at 75. Further, the prosecution has no less prejudicial means of demonstrating the extent of the victim's injuries, which occurred in 1992. *Id.* at 76. The photographs are gruesome; however, "[g]ruesomeness alone need not cause exclusion" under MRE 403. *Id.*

Affirmed.

/s/ Richard A. Bandstra
/s/ Patrick M. Meter
/s/ Jane M. Beckering